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Cases Cited.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. .....

THE BALTIMORE & OHIO RAILROAD COMPANY,
Petitioner,

vs.

ALBERT C. JOSEPH, ADMINISTRATOR OF THE ESTATE OF WILMA WINLAND, DECEASED,
Respondent.

BRIEF OF RESPONDENT OPPOSING PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF FACTS.

As is said by petitioner, the opinion of the Circuit Court of Appeals contains a full statement of the facts in this case, and we have no desire to burden this brief with any repetition; however, some very decisive facts

which petitioner has apparently attached little importance to, will bear repeating.

It must be remembered that respondent's decedent **admittedly** was a **guest** in this automobile and had absolutely no control over its operation at any time.

Although the burden was clearly upon the petitioner to prove contributory negligence on the part of such guest, nevertheless its counsel nowhere in the record asks the driver (Mr. Winland) whether decedent saw the train—or where or when she saw the train—or if or when she called his (Winland's) attention to such train. Nor is there any other attempt on the part of petitioner to show that decedent did not exercise ordinary care under all the facts and circumstances.

Another matter not mentioned in the court's opinion is that plaintiff's exhibits, numbers one (1), two (2) and three (3) on R., 183, 185 and 187, show the dangerous character of this crossing.

One other fact is that the petitioner's own testimony by its train crew shows it violated Ohio General Code Section 8853 and hence it was negligent per se.

ERRORS CLAIMED BY THE PETITIONER.

Petitioner assigns only three errors in the Circuit Court of Appeals as the basis for its petition for a writ of certiorari, the first two of which were submitted to the District Court at the time of trial and on petitioner's motion for a new trial, and in the Circuit Court of Appeals, both on the hearing on the merits and upon the application for a rehearing, and the third assignment was submitted to the Circuit Court of Appeals on the application for a rehearing, and on each occasion, all of such as-

signments were resolved against the contention of the petitioner.

We shall discuss these three assignments of error in the same order in which they appear in the brief of the petitioner.

I. Did the Circuit Court of Appeals Err in Refusing to Decide that Respondent's Decedent Was Guilty of Negligence as a Matter of Law Under the Laws of the State of Ohio?

In its brief, petitioner cites the following well known Ohio cases defining the duty of **a driver** at a grade crossing:

Pennsylvania Railroad Co. v. Rusynik, 117 O. S., 530;
Lang, Admx., v. Pennsylvania Railroad Co., 59 O. App., 345;
D., T. & I. Railroad Co. v. Rohrs, 114 O. S., 493;
Patton v. Pennsylvania Railroad Co., 135 O. S., 159;
Railroad Co. v. Kistler, 66 O. S., 326;
B. & O. Railroad Co. v. Heck, Admx., 117 O. S., 147.

There is no question but what the above-cited cases establish the duty of a **driver** at a railroad crossing in Ohio. The quotations in petitioner's brief from those cases are correct. We shall not repeat them.

The trouble, however, with petitioner's contention is that respondent's **decedent was not a driver** crossing a railroad crossing at grade, and hence any and all of the above cases have no application whatever to the case at bar, as the Circuit Court of Appeals correctly concluded.

Respondent's **decedent was, without dispute, a guest** in the car in which she was riding **and had absolutely no control** or management over the operation of it and, there-

fore, the rule in issue in this case in the trial court and the rule applied by the Circuit Court of Appeals was the rule established by the Supreme Court of Ohio **applicable to a guest or passenger.**

Petitioner urged in the Circuit Court and is now urging here that the law of Ohio applicable to a driver should be applied to the conduct of decedent who was admittedly a guest in spite of the fact the Supreme Court of Ohio has repeatedly and unequivocally said that a very different rule governs the conduct of the guest. The Circuit Court of Appeals refused to misapply the law but did apply the law in this case exactly as it exists in Ohio, as we shall now show.

Now just what is the law in Ohio with reference to the duty of a guest or passenger, as distinguished from the duty of a traveler or driver? The law on this subject is well settled in Ohio in an unbroken line of authorities as follows:

In the case of **Toledo Railway Company v. Mayers**, 93 O. S., 304, the syllabus, which is the law of the case in Ohio, is as follows:

> "Plaintiff was injured as a result of a collision of a street car and an automobile in which he was riding, as the guest of the owner and driver, and in the front seat with him, said collision occurring at an intersection of highways outside the city limits, held:
>
> 1. That the negligence of such driver is not imputable to the plaintiff, and if the collision was caused by the negligent operation of the street car, plaintiff may recover from the operating company unless his own negligent act or omission directly contributed to cause his injury.
>
> 2. Though plaintiff was required to exercise ordinary care for his own safety and to reasonably use his faculties of sight and hearing to observe and

avoid the dangers incident to crossing such track, an instruction that he 'was not exonerated from any duty at all by reason of the fact that he himself was not driving the machine' is erroneous."

During the course of the opinion, Matthias, J., says at page 309:

"It has long been the settled law of this state that when one is injured by the wrongful act of another, without concurring negligence upon his own part or by some one who is under his direction or control, he is entitled to recover from him who caused the injury. It is likewise settled that the doctrine of imputed negligence does not obtain in Ohio."

The next case in this line of unbroken authority is the case of **Board of Commissioners v. Bicher, Admx.**, 98 O. S., 432, in which a per curiam decision was handed down. In this case the decedent was a guest of the driver and recovered a verdict against the defendant. In this case, in the Supreme Court, the defendant made exactly the same contention as the petitioner is making here in the instant case, because the defendant there claimed that the trial court erred in refusing to give the following special charge before argument, to wit:

"I now charge you that Mr. Bicher seated as he was in the front seat by the side of Mr. Adams, the driver, was required to reasonably use his faculties of sight and hearing to observe and avoid any impending dangers incident to such driving along a country pike during the nighttime, and apprise the driver of the machine as would a person of reasonable and ordinary prudence under the same or similar circumstances."

In disposing of this contention, which is identical with the contention of the petitioner here, the Supreme Court said at page 437:

> "Plaintiff in error by the request made desired the court to instruct the jury what in the particular circumstances of this case a person of reasonable and ordinary prudence would do. Such a thing can only be determined from the circumstances, **and these the jury must find.** They might find that under the facts of a particular case a person who is not driving, but is merely a guest, might, under the circumstances disclosed in that case, **rely on the driver without being negligent or imprudent.** Especially would this be true if there was nothing in the situation indicating probable danger." (Bold type ours.)

Here we find the Supreme Court of Ohio announcing the rule defining the duty of a guest, and holding that it was not error to refuse a request which embodied exactly the proposition of law for which the petitioner here in the instant case contends.

Furthermore, in the Bicher case, at page 436, the Supreme Court of Ohio in speaking of the Mayers case in 93 O. S., 304, says:

> "In that case, where a guest of the owner and driver was injured, it was held that the negligence of the driver of an automobile which comes into collision with a street car is not imputable to the guest, although the guest is required to exercise ordinary care for his own safety and to reasonably use his faculties of sight and hearing to avoid danger incident to crossing the track. **But it is the function of the jury to determine from the facts shown in each case whether the injured person used such care, and what care the circumstances required."** (Bold type ours.)

The next case in this line of authorities by the Supreme Court of Ohio is the case, peculiarly enough, cited

by the petitioner, of **Hocking Valley Railway Company v. Wykle**, 122 O. S., 391.

In the syllabus of this case, which, of course, under the law of Ohio, establishes the law, the court says:

> "One riding as a guest in an automobile **does not assume the responsibilities of the driver**, and the driver's negligence may not be imputed to him. He is required to exercise that care for his own safety which persons of ordinary care and prudence are accustomed to exercise under the same or similar circumstances, and that test should be applied in an action wherein he seeks to recover damages for injuries sustained in a collision of such automobile and a railroad train at a grade crossing." (Bold type ours.)

This court will find from a reading of the Wykle case that the facts are quite similar to the instant case, and hence we call this court's attention to several pertinent paragraphs in the opinion by Matthias, J., as follows at page 393:

> "From a consideration of the evidence adduced, it must be concluded that the trial court was fully warranted in submitting the issue of contributory negligence to the jury. The evidence must be viewed in its aspect most favorable to the plaintiff, and we shall now refer to only that portion of the record."

At page 394:

> "Counsel for the railway company requested separate instructions covering the duty of the plaintiff as follows:
>
> " 'It was the duty of the plaintiff, riding in the Ford automobile, to use ordinary care in the exercise of his own faculties in looking and listening for a train as the automobile approached the crossing, and such looking and listening should have been at such time and place and in such manner as would be effective to accomplish the ends designed thereby.' "

We call this court's particular attention to the fact that this quoted instruction requested in the Wykle case is exactly the position of the petitioner in the instant case, and the Supreme Court in the Wykle case held that such instruction **was properly refused**, and hence decided that the position of the petitioner in the instant case is untenable, and we call this court's attention to what Matthias, J., said in that case concerning this proposed instruction at page 395:

> "Both of these requested instructions were refused by the trial court.
>
> The question is thus presented as to the duty of a guest in an automobile under the circumstances disclosed by the record and the instruction that should be given the jury in that regard. While the authorities differ somewhat in the statement of the rule governing the conduct of passengers or guests in an automobile and prescribing their duties, all are in accord that the guest in an automobile is not entirely relieved from obligation to exercise care for his own safety. Clearly it is his duty to exercise that care which persons of ordinary care and prudence are accustomed to exercise under the same or similar circumstances. Hence, while one riding as a guest in an automobile is not charged with the duty of being on the lookout for possible dangers, such as devolves upon the driver of the automobile, yet when approaching a known railroad grade crossing it is his duty to exercise his senses of sight and hearing as would a person of ordinary care and prudence under the same or similar circumstances to observe the approach of a train and apprise the driver thereof. **The conduct of the guest to come within the requirement of ordinary care would differ somewhat under varying circumstances. In that respect the court should not go further in instructing the jury than was indicated in Toledo Railway v. Mayers**, 93 O. S., 304, and **Board of Commissioners v. Bicher, Admx.**, 98 O. S., 432.
>
> It is a matter of common knowledge that under ordinary circumstances **such occupants do largely**

rely upon the driver, who has the exclusive control and management of the vehicle, exercising the required degree of care, and for that reason courts are not justified in adopting a hard and fast rule that they are guilty of negligence in doing so. Every case must depend upon its own particular facts.

Our conclusion therefore is that the trial court did not commit error prejudicial to the plaintiff in error in refusing to give the instructions above set forth." (Bold type ours.)

Now, under the law as announced by the Supreme Court of Ohio in the Wykle case and the cases preceding it, can it be said that respondent's decedent was guilty of contributory negligence as a matter of law? The testimony in this record, as we have heretofore pointed out, by the husband is that the decedent did look. There is nothing in the record to establish that decedent did not see the train. Likewise there is nothing in the record to show that decedent having seen the train did not call it to the attention of the driver. The record is strangely silent in this regard and nowhere does counsel for the petitioner seek or attempt to establish what the decedent saw or what she did at the time of the accident, in spite of the fact that under the well established law of Ohio the burden of showing contributory negligence is upon the defendant. There is no presumption of decedent's negligence. On the contrary, the presumption is that she was in the exercise of ordinary care. Although the driver was cross examined at great length by petitioner's counsel, not once was he asked what decedent said or did.

Suppose that the decedent did see this train, the inquiry might well be made, as it was made by the Circuit Court of Appeals, as to what the decedent could have done after she saw the train to have avoided the accident.

As indicating that in no event could the respondent's decedent be guilty of contributory negligence as a matter of law under the facts of the instant case, we call this court's attention to a decision of the Supreme Court of Ohio in the case of **Pennsylvania Railroad Co. v. Lindahl**, 111 O. S., 502, at page 510, to wit:

> "Lindahl and Cook, however, were in different situations at the time of the accident. Cook was driving the machine, was familiar with the surroundings, and saw the train before he drove onto the track. Lindahl had no control over the machine and was unfamiliar with the surroundings, and there is no evidence that he had seen the freight cars, if he saw them at all, until just before he jumped from the automobile when it was actually upon the track.
>
> The argument of Cook amounts to a claim that the negligence of Cook should be imputed to Lindahl; that the negligence of Cook was the negligence of Lindahl. However, the doctrine of imputed negligence does not obtain in Ohio. * * * Hence, granting that Cook was negligent in driving onto the track when he saw the train approaching the crossing, this negligence cannot be imputed to Lindahl.
>
> When Lindahl was confronted with the sudden emergency of finding himself in an automobile crossing a track upon which a train was bearing down, he was required to use only that degree of care which an ordinarily prudent person would exercise under the same or similar circumstances. **It was a question of fact** whether Lindahl saw the train in time to avoid the accident so far as he was concerned, and used the requisite degree of care, **and that question was rightly submitted to the jury.**" (Bold type ours.)

The burden of proving contributory negligence was upon the defendant in this as in every other case, and yet there is nothing in this record to show that the respondent's decedent did not look, nor is there anything in the record to show that she did not see the train, nor is there anything in the record to show that she did not make

some outcry or give warning to the driver, and yet if she did any one of these things, she would have been exercising ordinary care, as the same has been repeatedly defined by the Supreme Court of Ohio. No one as yet has been so bold as to urge that ordinary care on the part of a guest would require her to grab the steering wheel from the driver, nor would it require her to jump from her side of the automobile under the wheels of the oncoming train.

The question of decedent's negligence was one of fact for the jury and was correctly submitted to the jury by the trial court.

Furthermore, under the law of Ohio, a guest in an automobile is not required to call attention of the driver to any object which appears to the guest at the time to be perfectly apparent to the driver. This accident occurred in broad daylight and certainly respondent's decedent was entitled to assume, if it is necessary to determine what she was legally entitled to assume, that the driver of the car could see the oncoming train, and that it required no warning from her. In this regard, we call the court's attention to the following authorities:

Pennsylvania Railroad Co. v. Lindahl, 111 O. S., 502;
Hocking Valley Railroad Co. v. Wykle, 122 O. S., 39;
Keiner v. W. & L. Erie Company, 34 O. App., 409;
Slee v. Neller, 226 Mich., 151, 197 N. W., 530;
Jerko v. Buffalo Railroad, 275 Pa., 459, 119 Atl., 543;
Schosstein v. Bernstein, 293 Pa., 245, 142 Atl., 342.

Petitioner claims that the Circuit Court of Appeals did not apply the law of Ohio. The fact is that petitioner sought to have the Circuit Court of Appeals apply to re-

spondent's decedent, who was a passenger, the rule of conduct applicable to a driver, and this, of course, the Circuit Court of Appeals refused to do.

The Circuit Court of Appeals did apply to respondent's decedent the rule of law applicable to a guest, as we have attempted to set forth herein, and the Circuit Court of Appeals in its opinion very properly says (R., 216):

> "This required her to look and listen and warn Winland of any train's approach. She too must have seen the train if she looked as required by law; **but appellant had the burden of proving her contributory negligence and was unable to show that she did not warn Winland of the train's approach after she saw or could have seen it, or that she failed to take any step by which the accident could have been avoided.**" (Bold type ours.)

The district court very correctly charged the jury and we quote from its charge as follows:

> "Bearing in mind, however, that if Wilma Winland was guilty of negligence or contributory negligence, such as to be all, or a part of the direct and proximate cause of her own injuries, her administrator, Albert C. Joseph, cannot recover." (R., 167.)

And again:

> "Here again, the court can only say to you, that Mrs. Winland was required to use that degree of care for her own safety which would have been exercised by a reasonably cautious and prudent person under the same or similar circumstances. If she exercised that degree of care, she was not negligent. But if she exercised a lesser degree of care, she was negligent, and if that negligence was the direct and proximate cause of her injuries and death; or if it was a part of the direct and proximate cause, the administrator cannot recover in this action. This is true even though you should find that the defendant was negligent in one or more of the respects claimed by the plaintiffs." (R., 171.)

And again:

> "However, the court desires that you clearly understand, that although the burden of proving contributory negligence is upon the defendant, if the evidence as a whole establishes contributory negligence on the part of either or both Mr. and Mrs. Winland, that fact will avail the defendant as a defense, just as well and as completely as if established by specific evidence offered by the defendant." (R., 172.)

We think that the contributory negligence of respondent's decedent was a question for the jury and the court very fairly and very properly submitted such question.

Furthermore, in the determination of a question such as this, under the law of Ohio, the evidence must be viewed in the light most favorable to the plaintiff. In this respect we quote from the case of **McMurtrie v. Wheeling Traction Company**, 107 O. S., 107, syllabus 1, as follows:

> "I. Where any phase of the facts, as shown by the evidence upon the subject of contributory negligence, will warrant the inference that the plaintiff, at the time of the injury, was exercising due care, it cannot be said that plaintiff was guilty of contributory negligence as a matter of law."

In the opinion by Robertson, J., at page 111, it is said:

> "In arriving then at whether there was any phase of the evidence which would tend to prove the absence of negligence on the part of plaintiff, the court would be required to consider the evidence in its most favorable aspect toward the plaintiff, and in doing so consider the favorable evidence and disregard the unfavorable evidence."

II. Did the Circuit Court of Appeals Err in Deciding THAT THE LAST CLEAR CHANCE DOCTRINE Was Applicable?

Petitioner complains that the trial court erred in submitting to the jury a charge embodying the doctrine of last clear chance and that the Circuit Court of Appeals was in error in holding that such doctrine was properly submitted to the jury.

The law of last clear chance is well settled in Ohio and it would serve no good purpose to analyze the cases cited by the petitioner. With such law we agree. Petitioner makes the point that respondent's decedent was guilty of contributory negligence which was continuous and concurrent with the negligence of the train crew, and that therefore the doctrine had no application. It further contends that even though her negligence was not continuous and concurrent, petitioner did not see decedent in time to have **stopped** its train clear of the crossing.

We think that under the proven facts not only was the doctrine applicable in this case, but that it would have been error for the court to have refused to charge upon it.

Decedent's negligence, if any, could not have been continuous and concurrent with that of the petitioner under the proven facts.

The head brakeman, one Snyder, saw the automobile about 15 feet from the west bound track; the train was then about 10 car lengths from the crossing, which would be about 400 feet; when the automobile was about five feet from the west bound track and still moving, he, Snyder, hollered to the engineer, and he testifies as follows:

> "Q. And when you hollered what did you holler?
> A. Stop, there is an automobile, and as hard as I could holler, and loud.

Q. When you hollered about how far away from the crossing would you say the engine was? A. About seven or eight car lengths.

Q. After you hollered what did you see the automobile do? A. After I hollered why I seen him pull over there and stop.

Q. The automobile? A. Yes." (R., 124.)

Under this testimony of the petitioner itself, it would clearly be its duty to thereafter exercise ordinary care to avoid colliding with this car, and if it did not do so, and such negligence of the respondent's decedent, if any, had ceased, then the doctrine of last clear chance was applicable.

Clearly, decedent being a passenger or guest would have no control over the automobile, and if, as the head brakeman says, the car stopped upon the tracks, it would at least be a question of fact for the jury as to whether there was any negligence at all on the part of a guest, or if there was, whether it had terminated.

The record then very clearly demonstrates that the petitioner's train crew did not thereafter exercise ordinary care to avoid the collision. We shall quote briefly from the record. Although the head brakeman saw this automobile first at a distance of 400 feet (R., 126) **he did not** warn the engineer until the train was about 7 or 8 car lengths from the crossing. (R., 124.) He then hollered to the engineer to stop and he frankly admits that in spite of so doing, the **train did not slacken** its speed until just as it hit the automobile, as is shown by this testimony:

"Q. The way you know the brake went on was because you felt the pull of your train? A. Hear them, hear the air.

Q. Naturally you felt the pull, didn't you? A. Yes.

Q. From the time you heard air going on you noticed your train begin to slacken speed till it finally stopped? A. I didn't feel it slack so much right then.

Q. When did you feel it slacken? A. Felt it slacken a little about the time we hit the car.

Q. You mean this train went on 280 feet, and you did not feel it slacken at all? A. No, sir.

Q. You think you were going just as fast when you hit the automobile as when you hollered? A. Might not have been, but I did not notice it slacken so much."

This is the testimony of the only member of petitioner's train crew that saw this automobile before it was struck, although, admittedly, there were three members of the train crew in the engine.

At page 22 of its brief, petitioner says:

"The train, on the contrary, at that distance could not have been **stopped** short of the crossing. Everything that could be done was immediately done by the engineer to **stop it.**"

This is, to say the least, a misleading statement, because to have avoided this accident, it was not necessary that the train be **stopped short of the crossing.** The automobile, if the story of the driver was correct, was proceeding slowly across the tracks. If the story of the head brakeman, Snyder, is correct, it was proceeding slowly across the track and suddenly stopped on the east bound track, and yet this same brakeman testifies that the speed of the train as it traversed a distance of approximately 300 feet or more after he hollered to the engineer did not **slacken its speed** until just as it struck the automobile. The inference is irresistible, and it is a matter of common knowledge, that as soon as the emergency brakes were applied, this brakeman would have

felt the slackening of the speed, and hence the jury had the right to determine whether or not anything was done by this train crew to either stop **or slacken** the speed of this train in order to avoid colliding with this automobile.

It is perfectly obvious therefore that upon this theory of the case the trial court was clearly correct and the Circuit Court of Appeals was correct in holding that the doctrine of last clear chance was in the case on the facts and properly submitted to the jury.

Furthermore, the exercise of ordinary care not only would have required the petitioner's train crew to have slackened the speed of the train, but would further have required it to give some warning to the driver of the automobile after the forward brakeman admittedly saw it and warned the engineer, and yet it is admitted by all of the train crew that from the time that the forward brakeman hollered to the engineer, no warning of any kind or character was given. Indeed no bell was ever rung on this engine and admittedly so.

Petitioner relies with great confidence upon the testimony of their supervisor of locomotives to the effect that this train could not have been stopped clear of the crossing. This argument of petitioner is based upon the mistaken idea that to have avoided this accident required that the train be stopped, when a mere slackening of its speed would have avoided the accident.

No better illustration of the point we make is available than a quotation from the opinion of the Supreme Court of Ohio in a case cited by petitioner, namely, **Railroad Company v. Kistler**, 66 O. S., 327, at page 340, and we quote, briefly, as follows:

> "If she was negligent in going upon the crossing in front of a rapidly approaching train, thinking that she could cross in safety, and the engineer

after seeing her was negligent **in not slowing down or stopping** his train, thinking that she would get across in safety, the proximate cause of the injury was the miscalculation and negligence of both, and there could be no recovery, unless the engineer after he saw her and realized her danger had time to so slow down or stop as to prevent the injury. Or if the fireman and brakeman riding on the left side of the engine saw her and saw and realized her danger in time to notify the engineer in time **to enable** him to **slow down or stop** the train as to have prevented the injury, and failed to so notify the engineer, such failure would be such negligence as would sustain recovery." (Bold type ours.)

In the instant case, it is perfectly obvious from the petitioner's own testimony that if the air had been applied by the engineer when the brakeman hollered to him, that it would have slackened the speed of this train considerably, even though it be conceded that it would not have stopped short of the crossing, and obviously a very slight slackening of this train or any warning given at that time would have avoided the collision. In any event, such questions were properly submitted to the jury.

All of the elements of the doctrine of last clear chance are present in this case and the court was correct in submitting the same to the jury, and the Circuit Court of Appeals was correct in approving such submission.

In the case of **Pennsylvania Railroad Company v. Crouse**, 286 Fed., 376 (C. C. A. 6), our own Circuit Court of Appeals points out that in a case almost identical with the instant case, where the trainmen did not **promptly enough try to stop** the train, this issue was properly submitted to the jury.

III. Does the Decision of the Circuit Court of Appeals Permit Thomas Winland to Recover for the Pecuniary Value of His Wife's Services Even Though the Law of Ohio Denies a Negligent Beneficiary Any Recovery in a Wrongful Death Action?

In the action in the District Court, an action of Thomas Winland against the B. & O. Railroad Company, and the instant case against the same defendant, were consolidated and tried to the same jury, but separate verdicts were returned.

This court will observe that petitioner is now attempting to treat the two cases as though they were one and the same action, and is attempting to predicate error in the action of the District Court in the instant case by the Thomas Winland case. This we submit cannot be done.

The assignment of error urged here amounts to a contention that the trial court should have charged the jury in the instant case **as a matter of law** that Mr. Winland, one of the beneficiaries, was not entitled to recover any sum whatever for the wrongful death of his wife because of his own negligence.

This same error was urged in the Circuit Court of Appeals under that very title and the Circuit Court of Appeals we think very properly and correctly held that there was no error in the manner in which this question was submitted to the jury in the trial court.

While it is true that the Circuit Court of Appeals in the Winland case, that is the case of the husband, held he was guilty of negligence as a matter of law, nevertheless this petitioner cannot now urge this particular assignment of error, for the reason that in this case the trial court submitted the question of Mr. Winland's negligence

to the jury as affecting his right to recover as a beneficiary, and not only did the trial court submit it correctly, but we shall show that petitioner, in the trial court, requested the charge to be made in that very manner.

In its charge (R., 174 and 175) in this case, the trial court said:

> "There is one circumstance which may materially affect the amount that you can allow under this first cause of action. If you shall determine that Thomas Winland was guilty of contributory negligence which was a part of the direct and proximate cause of the injury and resulting death of Wilma Winland, then you may not award any sum under this cause of action for any pecuniary loss that Thomas Winland may have suffered by reason of the death of Wilma Winland. In such case, the administrator, under this cause of action, would be permitted to recover only for the loss that the child, Winona Richmond, suffered by reason of the death of her mother."

Now for at least two very obvious reasons, from the record, counsel for petitioner is in no position to complain.

First, the appellant did not except to that part of the charge to which it now complains. The only thing petitioner's counsel said with reference to this part of the charge is found on page 179 of the record, as follows:

> "May we have an exception to the matters enumerated by the court in defining to the jury the pecuniary elements of pecuniary loss with respect to the first cause of action in the administrator's case for the wrongful death of Wilma Winland?"

How can this language of petitioner be distorted into an exception to the charge of the court concerning Mr. Winland's right as a beneficiary to recover as is now complained of by petitioner?

The law is well settled that exceptions must be specific so that the court's attention is directly called to the language challenged.

In support of this doctrine, we cite:

Holloway v. Dunham, 170 U. S., 615 at 620;
Newport News Company v. Pace, 158 U. S., 36;
Union Pacific Railroad Co. v. Thomas, 152 Fed., 365;
Price v. Pankhurst, 53 Fed., 312;
Lincoln v. Claflin, 7 Wall. (U. S.), 132; 19 L. Ed., 106;
Cooper v. Schlesinger, 111 U. S., 148, 4 Sup. Ct., 360, 28 L. Ed., 382.

Secondly, the record clearly discloses that petitioner is now complaining of the charge of the trial court not only in respect to something to which it did not except, but petitioner requested the trial court to so charge. Its contention now is clearly an afterthought.

We call this court's attention to petitioner's request for special instructions, No. I (R., 160), as follows:

> "I. If you find that the administrator of the estate of Wilma Winland is entitled to recover for her death, you are instructed that you cannot allow as damages in said cause of action any sum whatever to be apportioned to Thomas Winland if you find that he was guilty of any negligence that directly or proximately contributed in the slightest degree to the accident that caused her death."

The trial court refused to give the above request **before argument**, and strange enough, in view of its present contention, petitioner's counsel excepted to such refusal, but the trial court gave the substance of such request in its general charge, as we have heretofore shown.

How can petitioner now urge that the trial court should have charged that Thomas Winland was guilty of negli-

gence as a matter of law and hence no sum should be allowed to him as a beneficiary when it did not take such position in the trial court, and did not ask the court to so charge, but on the contrary requested the court to charge exactly as it did charge?

Furthermore, we should like to inquire just how petitioner arrives at the conclusion that the decision of the Circuit Court of Appeals permits Thomas Winland to recover anything for the wrongful death of his wife.

Decedent left surviving her Thomas Winland and a minor child, namely, Winona Richmond. The fact that Thomas Winland, as a beneficiary, was negligent, and hence could not share in any verdict or judgment recovered, would not in any way defeat the administrator's right to recover, and there is not a word or syllable in this record to show that the jury allowed anything to Thomas Winland for the wrongful death of his wife. On the contrary, respondent is fortified with the very salutary rule that the presumption is that the jury followed the court's instruction and in the absence of a special finding, petitioner should not be permitted to indulge in the loose conclusion as it does on page 27 of its brief, namely:

> "So that obviously the jury in the instant case did not find that Mr. Winland was guilty of contributory negligence, and, in accordance with the trial court's charge, included as a part of its verdict some sum to compensate the husband for the pecuniary loss he sustained by the death of his wife."

The verdict was general. No special finding was asked by the petitioner.

We submit that when the trial court charged the jury that it could not allow any damages to the husband,

Thomas Winland, if he was negligent and such instruction was in accordance with the request of counsel for the petitioner, and petitioner did not except to such charge, nor did the petitioner request the trial court to charge further, it is now too late for it to raise such question here.

CONCLUSION.

For the reasons set forth herein, respondent respectfully urges that the petition for a writ of certiorari in the instant case should be refused.

Respectfully submitted,

JOHN D. GARDNER,
Steubenville, Ohio,
WILLIAM DIXON,
QUENTIN DOLFI,
Martins Ferry, Ohio,
Attorneys for Respondent.